IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

ST/00556/2009

[arising out of Order-in-Appeal No.13/2009 (M-ST) , dated 30.04.2009 passed by the Commissioner of Central Excise (Appeals), Chennai]

M/s. MOHABIR ENTERPRISE APPELLANT

Versus

COMMISSIONER OF SERVICE TAX, CHENNAI-III RESPONDENT

Appearance:

For the Appellant Ms. Minchu Mariam Punoose, Adv.
For the Respondent Shri B. Balamurugan, AC (AR)

CORAM:

Hon'be Smt. Sulekha Beevi C.S, Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar , Member (Technical)

Date of hearing/decision **26-09-2017**

FINAL ORDER NO. 42368/2017

Per Bench:

The brief facts of the case are that the appellants filed a refund claim of Rs.1,83,06,565/-, being the service tax paid by them mistakenly under the category of "Survey and Exploration of Minerals Services." According to the appellants, the activities undertaken by the would have come under the said category or in other category during the relevant period and, therefore, requested for refund of the service tax paid for the period 25.04.2006 to 20.01.2007 by a claim which was received by the department on 05.03.2008. Show-cause notice dated 14.03.2008 was issued proposing to reject the refund claim and after adjudication the original authority observed that the activities rendered by the appellants are taxable services under section 65(105)(zzzy) of the Finance Act, 1994, namely, "Survey and

Exploration of Minerals Services." It was also observed that the refund claim pertaining to the period prior to 20.03.2007 was hit by limitation as provided under section 11B of the Central Excise Act, 1944 read with section 83 of the Finance Act, 1994. Against the said order, the appellants filed appeal before Commissioner (Appeals), who vide the order impugned herein held that the activities of the appellants would not fall under taxable services of "Survey and Exploration of Minerals Services." However, the refund claim was rejected on the ground of being time-barred as stated above and also on the ground that the appellants had failed to discharge the refund claim is not hit by Doctrine of Unjust Enrichment. Being aggrieved, the appellants are not before the Tribunal.

2. On behalf of the appellant, the learned counsel Ms. Minchu Mariam Punoose submitted that the service tax was paid by the appellants on a wrong advice that the activities undertaken by them would fall under "Survey and Exploration of Minerals Services." The same was upheld by the Commissioner (Appeals), however the refund claim was rejected on the ground of unjust enrichment. She submitted that the appellants have not collected any tax from its customers and requested that the appellants should be given a chance to ~~proof~~ prove the same on the basis of documentary evidences, which the appellants will be able to furnish before the authorities below

3. The learned Authorised Representative reiterated the findings in the impugned order.

4. Heard both sides and we have gone through the records.

5. The main ground for rejection of the entire refund claim is that the appellants have not furnished sufficient documents to

establish that the incidence of duty has not been passed on to another. The Commissioner (Appeals) has rejected the refund claim on this ground observing that the appellants have not taken such a plea before him. However, while considering a refund application, the authority is incumbent to adjudicate the issue of unjust enrichment also. In such circumstances, we may deem it fit to remand the matter to the original authority to consider the issue of unjust enrichment. The adjudicating authority shall give the appellants a chance of personal hearing as well as sufficient time to produce documents.

6. Another contention of the appellants is that the refund claim is not hit by limitation, since the appellants had paid the service tax by mistake. That as per mandate of Constitution no tax can be levied or collected without the authority of law and since the Commissioner (Appeals) has held that appellants are not liable to pay tax, the payment having been made under mistake, the refund claim is not barred by limitation. In this regard, we note that the Hon'ble Bombay High Court in *Andrew Telecom (I) Pvt. Ltd. Vs CC & CEX Goa* - 2014 (34) STR 562 (Bom.) examined this issue elaborately. The Hon'ble High Court held at para-19 as follows:

> "**19.** Before us, the undisputed position is that the amount was paid by the Appellant as Service Tax. That tax was not imposable or leviable on export of services was a clarification made by the Department and relying on that clarification, the refund of duty or Service Tax was claimed. This was squarely a case falling within the provisions of the Central Excise Act, 1944 and therefore, the rule of limitation under Section 11B was applied. That was applied when the application for refund was made invoking Section 11B of the Central Excise Act, 1944. We have no manner of doubt that when this was the provision invoked, same applies with full force including the rule of limitation prescribed therein. For these reasons, we are of the opinion that the decisions relied upon cannot be of any assistance."

7. In the above decision, the Hon'ble High Court categorically held that there is no warrant or justification for holding that a stale or belated claim can be granted in a constitutional remedy by ignoring a

statutory prescription. The decision of the High Court was on an appeal filed by the assessee challenging the decision of the Tribunal on the applicability of limitation when the tax was purportedly paid by mistake understanding of law.

8. The Hon'ble Madras High Court in *Nataraj and Venkat Associates* – 2015 (40) STR 31 (Mad.) held as below:

> "**8.** From the Materials available on record, it is seen that the amounts were credit to the Revenue under the Head of Account "0044-Service tax" through TR-6 challans, which are purported for payment of Service Tax only and as such, the claim of the respondent that the payment was only deposit and not Service Tax, cannot be sustained. Further, a tax be it, direct or indirect, is intended for immediate expenditure for the common good of the state and it would be unjust to require its repayment after it has been in whole or in part expended, which would often be the case in most payment of such sort. Therefore, it is impracticable for the authorities to refund applications that are filed beyond time even it is paid under a mistake of law. Therefore, the authorities have rightly rejected the claim of the respondent and this aspect has not been taken not of by the learned single Judge."

9. On the basis of our discussions and analysis, we find that the authorities below have rightly rejected part of the refund claim as time barred. However, with regard to the issue of unjust enrichment, as discussed above, we deem it fit that the appellant has to be given a chance to establish that the incidence of duty has not been passed on. We therefore set aside the finding of unjust enrichment and remand the same to the adjudicating authority for considering the said issue. The appeal is allowed by way of remand.

(Dictated and pronounced in open court)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

Sulekha Beevi
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

ksr
23-10-2017